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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 832

DR. BENJAMIN F. JOHNSON, JR.,
Appellant,

vs.

MISSISSIPPI STATE BOARD OF HEALTH,
Appellee

STATEMENT DISCLOSING JURISDICTIONAL BASIS FOR REVIEW AND OTHER MATTERS REQUIRED BY RULE 12, SECTION 1 AS AMENDED.

In compliance with Rule 12, Section 1 of the Supreme Court of the United States as amended, appellant files this statement disclosing the jurisdictional basis upon which it is contended said Appellate Court should review the judgment and proceedings herein, and other matters thereby required, this being an appeal from the Supreme Court of the State of Mississippi.

Timely Filing of Petition for Appeal

The original opinion of the Supreme Court of Mississippi herein was rendered October 9, 1944, under Rule 14 and related rules of said court, appellant filed a Suggestion of Error which was by it overruled November 27, 1944; wherefore, its judgment against appellant reversing a judgment of the Circuit Court of Hinds County, Mississippi in his favor, and ordering reinstatement of an order of Appellee Board attempting to revoke his license to practice

medicine in Mississippi, became final immediately thereafter. The application and petition for this appeal to the Supreme Court of the United States is presented and allowed December 12th, 1944, or within three months, and less than one month, from the day the judgment herein became final.

Statutory Basis for Appellate Jurisdiction Invoked Herein

By this appeal appellant challenges the validity of Chapter 32, Laws Extra Session 1938 of Mississippi (Section 8893 Mississippi Code 1942 Annotated, 6 Mississippi Code, 1942, Pages 571-573), both as written, and, as construed by the Mississippi Supreme Court in connection with Section 7026 and Section 7027, Mississippi Code, 1942 Annotated, and, also, the validity of the proceedings herein with respect to the failure of appellee or any other accuser herein to advise appellant of the nature and cause of the alleged accusation against him by some complaint or charge, the failure of Appellee Board to have process upon appellant except by a so-called notice by mail which was not sufficiently definite and certain with regard to the nature and cause of the accusation to afford him a reasonable opportunity to prepare and make defense herein, as a result of which Appellee Board never had any jurisdiction to revoke appellant's license so that the proceedings herein are and were unconstitutional and void because repugnant to the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the United States Constitution. Jurisdiction of the Supreme Court of the United States on these constitutional questions is invoked under Section 237 (2) of the Judicial Code, 28 U.S.C.A. 344(a).

Statutes and Construction Thereof Involved Herein

This is an appeal wherein the validity of a state statute as written and as construed by the highest court of the

state, is attacked on the ground that it is repugnant to the due process and equal protection clauses contained in Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The statute attacked herein is Chapter 32, Laws of Mississippi, Extraordinary Session of 1938 (Section 8893 Mississippi Code 1942 Annotated, 6 Mississippi Code, Pages 571-573), which is as follows:

"An Act to amend Section 5863, code of 1930, so as to authorize the state board of health to cancel or suspend licenses issued by it, and providing for the procedure in such cases, and for other purposes.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That section 5863, code of 1930, be amended so as to read as follows:

"5863. The Mississippi state board of health may on its own initiative or on complaint suspend or revoke for any cause named below any license that it has issued that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or curing disease, injury or other bodily condition; and said board is furthermore authorized and empowered to direct the cancellation in the office of the clerk of any circuit court of any record of any license so suspended or revoked.

"(a) The causes for which a license may be suspended or revoked and the record of such license cancelled are as follows:

"(1) The habitual personal use of opium of coca leaves, of cannabis, or of any preparation or derivative of any of them, hereinafter referred to as 'narcotic drugs'.

"(2) Administering, dispensing, or prescribing any narcotic drug aforesaid otherwise than in the course of legiti-

mate professional practice and for the prevention, alleviation, or cure of disease or for the relief of suffering, and not primarily for the purpose of catering to the cravings of an addict.

"(3) Conviction of violation of any federal or state law regulating the possession, distribution, or use of any narcotic drug aforesaid.

"(4) The use of alcohol or of any beverage or liquor containing alcohol, or of any drug, in such manner as incapacitates the licentiate for professional practice.

"(5) Procuring, or attemption to procure, or pretending to procure, or aiding or abetting in procuring or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman.

"(6) Conviction of a misdemeanor involving moral turpitude or of a felony.

"(7) Fraud or deception in obtaining a license to practice.

'(b) The state board of health, however, shall not suspend or revoke a license unless and until the board has caused written notice to be served on the licentiate to be proceeded against, hereinafter referred to as the respondent, informing him of the charges against him and appointing a time, not less than ten days after the service of notice, and a place when and where he may appear in person or by attorney to defend himself against such charges. Such notice may be served on the respondent personally or by registered mail addressed to him, post paid, at his last known address.

'(c) The board may subpoena persons and papers on its own behalf and on behalf of the respondent, may administer

oaths, and may compel the testimony of witnesses. It may issue commissions to take testimony, and testimony so taken and sworn to shall be admissible in evidence for and against the respondent. The board shall be entitled to the assistance of the chancery court or the chancellor in vacation, which, on petition by the board, shall issue ancillary subpoenas and petitions and may punish as for contempt of court in the event of noncompliance therewith. A hearing authorized by this section may be either public or private, as the state board of health deems to be in the public interest.

'(d) The board may make public its orders and judgments in such manner and form as it deems proper. It shall in event of the suspension or revocation of a license direct the clerk of the circuit court of the county in which that license was recorded to cancel such record.

'(e) Any person aggrieved by the action of the board may petition the circuit court for a writ of certiorari, and that court after a hearing may modify, affirm, or reverse the judgment of the board or may remand the case to the board for further proceedings. A petition for a writ of certiorari must be filed within twenty days, immediately following the service on the respondent of a copy of the order of judgment of the board, unless the court, for cause shown extends the time. If the state board of health in due course appeals from any decree of the court, no bond shall be required of it in order to perfect its appeal.

'(f) Every order and judgment of the board shall take effect immediately on its promulgation unless the board in such order or judgment fixes a different date. It shall continue in effect, notwithstanding an appeal by the respondent, unless the court, on the issue of a writ of certiorari, by injunction, or other decree terminates it earlier.

'(g) Unless the court otherwise decrees, a license that has been suspended by the board for a stated period of time shall automatically become valid on the expiration of that period and a license that has been suspended for an indefinite period shall become again valid if and when the board so orders which it may do on its own motion or on the petition of the respondent. A license that has been revoked shall not be restored to validity except: (1) after a rehearing by the board on petition of the respondent, for good cause shown, filed within ten days, immediately following the service on him of the order or judgment of the board revoking his license or (2) by order of the court, on petition as aforesaid. An licentiate whose license becomes again valid after a period of suspension or after it has been restored to validity after a rehearing or by an order of the court, shall record it again in the office of the clerk of the circuit court of the county in which he resides in conformity with the requirements of section 5854.'

"Sec. 2. Nothing in this act shall be construed as limiting or revoking the authority of any court or of any licensing or registering officer or board, other than the state board of health, to suspend, revoke, and reinstate licenses and to cancel registrations under the provisions of section 16, chapter 289, laws of Mississippi, 1936.

"Sec. 3. That this act shall take effect and be in full force from and after its passage.

"Approved August 10, 1938."

The proceeding herein to revoke appellant's license to practice medicine under the aforesaid statute having been originated and initiated by the Secretary and Executive Officer of the Appellee Board, or its Executive Committee (it is not clear from the record which of these so acted, but the so-called notice herein was signed by the Executive Officer), the aforesaid Supreme Court, in order to uphold the validity of the proceedings herein, resorted to Sections

7026, and 7027 Mississippi Code 1942 Annotated, (5 Mississippi Code 1942, pages 458-459), to hold that the power and authority reposed by the aforesaid statute in Appellee Board was also by said Sections 7026 and 7027, supra, delegated to, and reposed in, the Executive Officer of the Board (Section 7026), and the Executive Committee of Appellee Board (Section 7027), so that either the Executive Officer could exercise the entire grant of power and authority under Chapter 32, Laws of Mississippi Extra Session 1938, or the Executive Committee could so act, or Appellee Board itself could assume the powers thereby granted. The opinion of the court so construing these three statutes is attached hereto as Appendix "A".

The aforesaid Sections 7026 and 7027, Mississippi Code 1942 Annotated (5 Mississippi Code 1942, pages 458-459 are as follows:

"7026. President and executive officer—how elected—. At the first meeting of the state board of health after organization the board shall proceed to elect a president from among its members, and an executive officer who shall be a physician versed in bacteriology, hygiene, sanitary science, and otherwise fitted and equipped to execute the duties incumbent upon him by law, and who shall not engage in the practice of medicine. The executive officer shall be, by virtue of his election, a member of the state board of health and shall be the secretary of the board and committees appointed or created by the board. The term of office shall be six years and the salary of the executive officer and secretary shall be under the jurisdiction and determined by the state board of health, provided, said salary shall not exceed $5,000.00 a year. The executive officer shall be vested with all the authority of the board when it is not in session and subject to such rules and regulations as may be prescribed by the state board of

health, and for cause may be removed on majority of the appointed members."

"7027. Power to appoint executive committee.—The state board of health may elect or appoint an executive committee, to be composed of three of its members, with a chairman to be designated by the board from the members appointed on said committee; and said executive committee shall have authority to execute all the powers herein vested in said board, in the interim of the meetings of said board; and any action of said executive committee shall be legal and binding until modified or annulled by said state board of health, and all pains and penalties prescribed for violating the rules of the state board of health shall apply to any violation of the rules and regulations that may be prescribed by said executive committee. Any two members of the executive committee shall be a quorum for the transaction of business."

Opinions

The opinion of the Supreme Court of Mississippi is reported in — Miss. —, 19 So. 2d 445-448, and a true, correct and accurate copy thereof is attached hereto as Appendix "A" to this statement. The opinion of the aforesaid court on the Suggestion of Error on November 27, 1944, making the judgment of said court against appellant final, is attached hereto as Appendix "B" to this statement.

Statement of Nature of Cause, Rulings of Courts Bringing Same Within Jurisdictional Provisions Relied Upon, Manner in Which Questions Sought to Be Raised Arose, Method of Raising Them and Way They Were Decided by Courts.

This proceeding to revoke appellant's license under the aforesaid statute was originated and initiated by the Executive Officer and/or the Executive Committee of the Appellee Board on or about October 8, 1943, by a so-called notice

sent by registered mail to appellant, and received by him October 9, this notice being in words and figures as follows:

"MISSISSIPPI STATE BOARD OF HEALTH
Felix J. Underwood, M. D., Executive Officer

"Jackson, Mississippi

October 8, 1943

Registered Mail

"Dr. Benjamin F. Johnson, Jr.,
1102 Bratton Street
Jackson, Mississippi

"DEAR DOCTOR JOHNSON:

"The State Board of Health at its regular meeting to be held in the Library of the Mississippi State Board of Health in the Old Capitol Building in the City of Jackson, Hinds County, Mississippi, will on the 21st day of October, 1943, hear charges against you for the purpose of revoking your license as a physician, as heretofore issued to you to practice your profession by the state Board of Health. Hearing to be held at 8:30, a. m., Thursday, October 21, 1943.

"The charges on which this hearing will be held are:

1. Being convicted of the violation of the Federal laws regarding the possession, distribution, and use of narcotic drugs.
2. Procuring, or attempting to procure, or pretending to procure, and aiding and abetting in procuring or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman.

You may appear in person at said place, or by attorney, to defend yourself against such charges.

You may either by yourself, or attorney, submit to the Secretary of the State Board of Health, Dr. Felix J. Underwood, a list of all witnesses whom you may desire subpoenaed as witnesses in your behalf, or such papers, books

and records as you desire summoned with subpoenas duces tecum.

"Very truly yours,

FELIX J. UNDERWOOD, M. D.,
Secretary and Executive Officer."

(Seal Mississippi State Board of Health)
FJU:jlr "(Page — Rec.)

Upon receipt of the aforesaid notice, appellant, by his attorney, immediately and on October 11, 1943 requested the Secretary and Executive Officer sending said notice, to furnish him with something definite from which he could prepare his defense in words and figures as follows:

"October 11th, 1943.

"Registered
Return Receipt Requested:
Dr. Felix J. Underwood,
Secretary and Executive Officer,
Mississippi State Board of Health,
Jackson, Mississippi.

"MY DEAR DR. UNDERWOOD:

"Your letter by registered mail, directed to Dr. Benjamin F. Johnson, Jr., 1102 Bratton Street, Jackson, Mississippi, was received in due course by Dr. Johnson. This letter advises Dr. Johnson that the State Board of Health, at its regular meeting to be held in the Library of the Mississippi State Board of Health in the Old Capitol Building in the City of Jackson, Hinds County, Mississippi, will on the 21st day of October, 1943, hear charges against Dr. Johnson for the purpose of revoking his license as a physician. The hearing, as we understand it, is to be at 8:30 A. M., that morning. You state in your letter that the charges on which this hearing will be held are:

"1. Being convicted of the violation of the Federal laws regarding the possession, distribution, and use of narcotic drugs.

"2. Procuring, or attempting to procure, or pretending to procure, and aiding and abetting in procuring or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman.

"You further advise Dr. Johnson that he may appear in person at said place, or by his attorney, to defend himself against such charges. You further advise that Dr. Johnson may, either by himself or his attorney, submit to the Secretary of the State Board of Health, Dr. Felix J. Underwood, a list of all witnesses whom you may desire subpoenaed as witnesses in his behalf, or such papers, books and records as he may desire summoned with subpoenas duces tecum.

"Dr. Johnson has employed me to represent him as his attorney in connection with this matter. Upon my employment, I called your office but found that you had gone to New York and would not return until Monday, October 18th 1943. On Saturday morning, October 9th, I endeavored to talk with your secretary but was advised by Miss Brinson in your office, that she was away for the weekend. I then stated my business to Miss Brinson and she suggested that I talk to Dr. R. N. Whitfield. I talked with Dr. Whitfield and he suggested that I talk to Mr. R. T. Hilton, the County Attorney. I called Mr. R. T. Hilton and requested that he furnish me with a copy of any charges that had been filed before or with the State Board of Health against Dr. Johnson, that Dr. Johnson might have the opportunity of knowing what charges were made against him in accord with the Constitution of the United States, and the Constitution of the State of Mississippi. Mr. Hilton referred me to the provisions of Chapter 32 (H. B. 120), Laws of Mississippi, Extraordinary Session 1938, and stated that the charges made against Dr. Johnson were 'not formal charges' but were those stated in Items (3) and (5) under subparagraph A of Section One of Chapter 32, amending Section 5863, Mississippi Code of 1930.

"The above quoted charges from your letter are identical in wording with the provisions of Chapter 32, referred to above, however, there is nothing in your letter to indicate when, where, on what occasion, or the persons involved, and I, therefore, submit to you in all fairness, do not amount to any charges that should require a defense by Dr. Johnson.

"In other words, it is our view, Dr. Underwood, that one is entitled to know the nature and cause of the accusation that is made against him so that he may properly prepare his defense. I, therefore, request you, and am sending a copy of this request to the Attorney General and to the County Attorney, to whom I was referred on behalf of Dr. Johnson, requesting that we be furnished with the cause or nature of the accusations against Dr. Johnson, and that these charges be put in some formal attitude, that in fairness and justice, we may properly prepare the defense that you offer to Dr. Johnson. We can, upon receipt of these charges, if any, give you a list of the witnesses and the books, papers and records to demonstrate the innocence of Dr. Johnson of the particular charges. Of course, until we have the information herein requested, we cannot properly nor legally prepare any defense, and we feel sure that the State Board of Health desires to accord to Dr. Johnson, as well as to every other doctor and citizen, that right, fairness and justice guaranteed under our way of life.

"With all good wishes, I am

Sincerely,

FORREST B. JACKSON.

FBJ F

cc Hon. Greek L. Rice, Atty. General
Hon. R. T. Hilton, County Atty.

(Registered, Return Receipt Requested)" Pages — Rec.)

On October 15, 1943 the County Attorney of Hinds County, Mississippi, wrote appellant's attorney as follows:

"Hilton & Kendall

Attorneys-at-Law

1413-1414 Deposit Guaranty Bank Bldg.

"R. T. Hilton Jackson, Miss. Phone 3-1078

James T. Kendall October 15, 1943

"Mr. Forrest B. Jackson
241 Lampton Building
Jackson, Mississippi

DEAR MR. JACKSON:

"With reference to your letter dated October 11 to Dr. Underwood, a copy of which was registered to me, I have not been able to contact the Assistant Attorney General, Mr. Arrington, who has this proceeding in charge for the Attorney Generals Office, nor have I been able to contact Dr. Underwood; therefore I cannot speak for them about any matters with which they are more conversant than I, nor can I speak with certainty of those things of which they know all the facts and I do Not.

"I would like to get myself straight with you about one point of your letter to Dr. Underwood. You quoted me as saying "that the charges made against Dr. Johnson were 'not formal charges' but were those stated in Items (3), etc."

"I intended to say, speaking of the complaints which the Board of Health may have acted upon that I did not know of any written or formal charges being filed with the Board of Health and referred you to the law of 1938, having in my own mind, if I did not say so, that the Board could act upon its own initiative.

"I do not agree with your position, if it is your position, that this is a criminal matter in which your client is clothed with the constitutional guarantees required in an indictment. I do not think that if the charges are too general your client would have the right to ask for a bill of particulars. If this is what you intend by your letter, if you will phone me upon receipt of this letter I will furnish you with this information so far as I know or can ascertain.

"Yours very truly,

R. T. Hilton,
County Attorney.

RTH/hh" (Page — Rec.)

Then again on October 18, 1943, three days before the hearing was set, the said County Prosecuting Attorney wrote appellant's attorney further in this regard as follows:

"Jackson, Mississippi
October 18, 1943.

"Mr. Forrest B. Jackson
Attorney for Dr. B. F. Johnson
Jackson, Mississippi

"Dear Sir:

"With further reference to the charges against Dr. Johnson to be heard before the Board of Health on the 21st day of October, 1943, for the purpose of ascertaining whether or not his license to practice medicine should be taken from him, I beg to advise, though it has not been concurred in or submitted to the Attorney General's office, and will be subject to conforming to their wishes, the charge with reference to narcotics will not be pressed, but the charge with reference to procuring abortions when not necessary to save the lives of prospective mothers will be pressed, and the State will expect to prove that in the months of April or May unnecessary abortions on Mrs.

Tome E. Bankston and Mrs. Billie Catron were performed and there were many others prior to that time including Ida Lee Buckley, Annie Mae Ewell, and prior to the notice issued to your client many others, including Mrs. Gordon Penn, Mary Hale, Miss More, Miss Catherine Byrd, and since said time many others, including Mrs. Fuqua and Juanita Moore.

"Very truly yours,

R. T. Hilton,

County Attorney" (Page — Rec.)

As shown by the record of the hearing, appellant repeatedly asserted that he had a constitutional right to know the nature and causes of the accusation herein, the charges upon which he was to be tried, and that because of the methods which had been used in the proceeding appellant had not been able to prepare for, nor present, any defense in the matter; that he did not know for what he was to be tried, nor any of the circumstances of the cause with which he was charged.

Appellant also sought to make all of the proceedings at the hearing a part of the record, which Appellee Board formally refused to do so that all of the assignments at the hearing were by the Board excluded from the record to be made up on an appeal.

Despite appellant's objections however, Appellee Board resolved itself into a "court of inquiry", attempted to hear evidence and thereupon ordered revocation of appellant's license to practice medicine, all over the objections of appellant. Because of the informality of the proceeding appellant was not permitted formally to raise all questions sought to be raised.

However, thereafter appellant filed in the Circuit Court for the First Judicial District of Hinds County, Mississippi, a petition for a writ of certiorari, and in said peti-

tion he particularly and definitely challenged the validity of the statute under which Appellee Board attempted to proceed, and its construction and application in this particular proceeding specifically pointing out that said statute, both as written and as applied and construed, together with the proceeding itself and the order resulting therefrom, were unconstitutional and void because repugnant to the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 26 of the Constitution of the State of Mississippi of 1890. Appellant further particularly challenged the validity of the so-called notice herein and of the order passed thereon with particular reference to the failure thereof to advise appellant of the nature and cause of the accusation against him on account of its general, uncertain and indefinite language, the failure of Appellee Board to make up or cause to be made up, any charges or complaint whatsoever, and the actions of Appellee Board in refusing to allow appellant a reasonable opportunity to prepare and present his defense in the proceeding. This petition for a writ of certiorari appears on Pages—— of the Record herein and particularly points out the grounds set up in the Assignment of Errors herein.

On said petition, a writ of certiorari with supersedeas was granted and the proceeding came before the Circuit Court for the First Judicial District of Hinds County, Mississippi for hearing, whereupon said Circuit Court on February 24, 1944 held that the order of Appellee Board attempting to revoke appellant's license was null and void for these reasons:

(1) There was no legal process upon appellant either under the statute or in accordance with constitutional guaranties, and therefore Appellee Board had no jurisdiction to enter the order attempting to revoke his license.

(2) The constitutional requirements with reference to advising an accused of the nature and cause of the accusation against him were not complied with;

(3) Appellee Board had no jurisdiction to hear and determine this cause because of the general indefinite and uncertain language of the so-called notice and the lack of any charge or charges, or complaint against appellant,

(4) The proceeding herein, together with the order of the Appellee Board, deprived the appellant of due process and equal protection of the law required under constitutional guaranties. (Pages — — Rec.)

Said Circuit Court thereupon reversed and remanded the cause, but granted Appellee Board an appeal to the Supreme Court of the State of Mississippi. Thus it was that the Circuit Court of Hinds County, Mississippi, decided this cause and declared the order of Appellee Board null and void strictly on the proceeding herein, and its constitutionality under the Due Process and Equal Protection clauses, and, therefore, did not directly reach the validity of the act itself further than to hold indirectly that if the proceedings as to process, failure to make specific complaint and charges, and failure to advise appellant of the nature and cause of the accusation, if any, against him were in conformity to the act, it would be unconstitutional.

On that appeal Appellee Board filed the following Assignment of Errors to the judgment of the aforesaid Circuit Court of Hinds County, Mississippi, to-wit:

"(1) The lower court erred in holding that the Executive Committee or Executive Officer could not act in such case for the Mississippi State Board of Health.

"(2) The lower court erred in holding that there were no charges properly filed against the appellee.

"(3) The lower court erred in holding that the order of the appellant, permanently revoking the license of appellee, was null and void.

"(4) The lower court erred in holding that the appellee was denied due process and equal protection of the law.

"(5) The lower court erred in not affirming the decision or order of the Mississippi State Board of Health in permanently revoking the license of appellee."

Therefore it was that this cause was submitted to the Mississippi Supreme Court almost wholly upon constitutional questions and particularly upon the question of whether or not appellant (Appellee on that appeal) was denied due process and equal protection of the law as secured by constitutional guaranties.

On the Mississippi Supreme Court Appeal the following questions were sharply presented: (1) Appellee Board had no jurisdiction to hear and determine this matter because no charge or complaint had been filed so as to advise him with reasonable certainty of the nature and cause of any accusation against him. (2) The so-called notice to appellant did not conform to constitutional requirements of due process nor to the requirements of the statute under which the proceeding was attempted because: (a) It did not afford him a reasonable opportunity to be heard, same was too general, indefinite and uncertain to conform to constitutional requirements, amounted to no notice at all, failed to advise appellant of the nature and cause of the accusation against him, and did not afford him a reasonable opportunity to prepare and make defense in the proceeding and a reasonable opportunity to be heard on such defense, (b) the alleged notice was further without authority of law in that the statute required that Appellee Board "shall not suspend or revoke a license unless and until the board has caused

written notice to be served on the licentiate * * * informing him of the charges against him * * * etc.", and the alleged notice herein, not having been caused to be issued by Appellee Board as required by said statute, was null and void and of no effect, (3) That although the language of the statute could be said to be otherwise, the Legislative intent by the act in question was not to confer an arbitrary, unreasonable and unlimited discretion upon Appellee Board with reference to proceedings under this act and particularly with reference to the manner, method and form, of and in which such proceedings might be instituted and prosecuted, and to construe the statute in such a manner would make it violative of the due process and equal protection clauses of Section 1, Article 14 of the United States Constitution and related provisions of the Constitution of Mississippi.

In its original opinion the Supreme Court of Mississippi on this appeal upheld the validity of the notice herein, both as to statutory requirements, and constitutional guaranties and that said notice was lawfully issued by appellee's executive officer without any action by appellee, and served by mail upon appellant and thereupon held: (1) That the statute is constitutional and the discretionary language of the statute would be applied as written and, (2) that it was in the concurrent and co-existent discretion and jurisdiction of the Executive Officer of Appellee Board, the Executive Committee of Appellee Board, or Appellee Board itself, to initiate a proceeding under the statute and thereupon accuse, prosecute, try and convict a licentiate and revoke his license to practice medicine. The court further held that regardless of the language of the statute it was not necessary for Appellee Board to take any action with reference to such a proceeding, but that all action under the statute might be taken either by the Executive Officer under Section 7026 Mississippi Code 1942 Annotated, or by the

Executive Committee under Section 7027 Mississippi Code 1942 Annotated, and that it was unnecessary for any charge or complaint against an accused to be lodged with the board, or in fact to be made under any circumstances.

Whereupon appellant as appellee in that court, filed a Suggestion of Error directly assailing the statute involved both as written and as construed by the court as unconstitutional and void because of its repugnacy to the due process of law and equal protection of law clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States and to the due process of law clauses of Section Fourteen of the Constitution of Mississippi, for the reasons set out in the Assignment of Errors herein, which, to avoid prolixity, are hereby referred to and made a part of this statement.

Thereafter and on November 27, 1944, the said Mississippi Supreme Court overruled this Suggestion of Error refusing to alter its former opinion holding the proceedings herein valid and constitutional and affirming the validity of the statute under which they were attempted, both as written and as construed.

In appellant's original brief on that appeal (as appellee) he pointed out that under any view of the constitutionality of this statute was and is to be seriously doubted, it was believed that if the appellate court did not curb and limit the unlimited and arbitrary discretion granted by the language of the statute by a strict construction, it would certainly be held unconstitutional. The Mississippi Supreme Court affirmed and confirmed, not only the proceeding herein, but refused to place any limitations whatsoever upon the power and discretion granted to Appellee Board by the statute, but rather, broadened materially the repositories of the power and discretion by holding that same was not only granted to Appellee Board but also to the Executive

Officer of the board, and to the Executive Committee thereof, so that it was not only discretionary as to whether any action at all would be taken in a given case under the statute, against whom action would be taken, whether or not charges or a complaint would be filed or an accused given any information as to the nature and cause of the accusation beyond the language of the statute, but it is discretionary as to who would act and try an accused, that is, whether it would be the Executive Officer, the Executive Committee or the Appellee Board, and, as to which of these would act as to what.

Thus it was that appellant thereupon assailed the constitutionality of the act by Suggestion of Error after the Appellate Court had refused to limit the discretionary language thereof and in fact, materially broadened the discretion therein granted so as to make it applicable even as to what agency would exercise the power reposed.

Summarizing, before Appellee Board appellant sought an opportunity to know with reasonable certainty with what he was charged and a reasonable opportunity to be heard. Contending he was denied these he appealed to the Circuit Court of Hinds County, Mississippi, which held he had been denied these and declared the order void reversing the cause for proper proceedings; thereupon Appellee Board appealed to the Supreme Court of Mississippi where all the questions on this appeal were raised, and decided in favor of Appellee Board, wherefore, appellant seeks this appeal to present same to this Court for decision.

Citations of Decisions Believed to Sustain Jurisdiction Herein and Show Substantial Federal Question Involved

There being no complaint or charge filed against appellant by or before Appellee Board, and the so-called notice herein containing no facts or circumstances of any alleged

charge upon which he was to be tried, appellant was not advised as to the nature and cause of any accusation against him, no legal process was ever had upon him, he was not given a reasonable opportunity to be heard and make defense herein, nor a fair and impartial hearing, which was repugnant to the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Davidson v. *City of New Orleans,* 96 U. S. 97, 24 S. Ct. 616;

Truax v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254;

Postal Telegraph Cable Co. v. *City of Newport,* 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215;

Green v. *Briggs,* Federal Case No. 5, 764, 1 Curtis 311;

King Tonopah Mining Co. v. *Lynch,* 232 Fed. 485;

Chambers v. *State of Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716.

Appellee Board or its Executive Officer, or its Executive Committee, being the accuser and prosecutor of appellant, and acting at the same time as the judge and trier of the facts at the so-called hearing, without complaint or charge describing with reasonable certainty the nature and cause of the accusation against him was repugnant to the due process clause of Section 1, of the Fourteenth Amendment to the United States Constitution.

Northern Railway Co. v. *Henneford,* 303 U. S. 517, 58 S. Ct. 415, 82 L. Ed. 619;

Yick Yo v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220, II Cooley's Constitutional Limitations, 8th Edition, Page 873.

Chapter 32, Laws of Mississippi Extraordinary Session 1938 (Section 8893, Mississippi Code 1942 Annotated), is written almost wholly in discretionary terms by use of the word "may," so that same vests arbitrary, unlimited

and unreasonable power and discretion in Appellee Board to such an extent that whether or not it will act even against a known and proven transgressor is left wholly and entirely to its discretion, thus empowering it, within the limitations of this statute, and without violating any provision thereof, to act or not to act, to revoke the license of an accused or known transgressor, thus leaving it wholly within the power of Appellee Board to discriminate as among the members of the class to which the statute was intended to apply because of race, color, creed, personal animosity or other personal reason; therefore the act is in direct contravention to the guarantee of equal protection of the laws contained in Section 1 of the Fourteenth Amendment to the United States Constitution.

A. L. A. Schechter Poultry Corp. v. *U. S. A.*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.

Frank Haig, etc., v. *Congress for Industrial Organization, et al.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423.

Yick Wo v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

Schlesinger v. *State of Wisconsin*, 270 U. S. 230, 46 S. Ct. 260, 70 L. Ed. 557.

Roller v. *Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 524.

Wong Wing v. *United States*, 163 U. S. 228, 16 S. Ct. 977.

Wallace v. *Currin*, 95 Fed. 2d 856, certiorari granted, *Currin* v. *Wallace*, 305 U. S. 584, 59 S. Ct. 91, 83 L. Ed. 369, Affirmed, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441.

Sunday Lake Iron Co. v. *Wakefield*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154.

Marcus Brown Holding Co. v. *Feldman*, 269 Fed. 306, Affirmed, 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877.

U. S. v. *Johnson*, 319 U. S. 302, 63 S. Ct. 1075.

Willson v. *McDonnell,* 265 Fed. 432, Error dismissed, 257 U. S. 665, 42 S. Ct. 46, 66 L. Ed. 424.
McLeon v. *Majors,* 102 Fed. 2d 128.

In construing Sections 7026 and 7027, Mississippi Code 1942 Annotated with reference to the creation and powers of the Executive Officer of Appellee Board and its Executive Committee, respectively, as a part of the aforesaid Chapter 32, Laws of Mississippi Extraordinary Session 1938, the Mississippi Supreme Court broadened further the already unreasonable and arbitrary discretion vested in Appellee Board and held outright that there was no semblance of uniformity with respect to how an accused might be tried so that an accused licentiate, like appellant could lawfully be accused, prosecuted and given notice by the Executive Officer and/or Executive Committee and tried and convicted by Appellee Board, or vice versa or by any other arrangement in the discretion of any one of these three agencies, which their number of three would be able to form with the result that in the discretion of either of the three, either of them could do any particular act, or all the acts to be done in a proceeding for revocation of a medical license which is not only contrary to the provisions of the statute as written but also repugnant to the equal protection laws of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Willson v. *McDonnell,* 265, Fed. 432, Error dismissed, 257 U. S. 665, 42 S. Ct. 46, 66 L. Ed. 424.
Panama Refining Co. v. *Ryan,* 293, U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446, 645.
Opp Cotton Mills v. *Administrator of Wage and Hour Division of Department of Labor,* 312 U. S. 126, 657, 61 S. Ct. 524, 85 L. Ed. 402, 624.
Roach v. *Johnson,* 48 F. Supp. 833, *Vacated U. S.* v. *Johnson,* 319 U. S. 302, 63 S. Ct. 1075, 87 L. Ed. 1413.

Skinner v. *State of Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 reversing, 115 Pac. 2d, 123, 189 Okla. 235.

Simms v. *Rivers*, 84 Fed. 2d. 871, Cert. den. 298 U. S. 682, 56 S. Ct. 960, 80 L. Ed. 1402.

National Candy Co. v. *Federal Trade Commission*, 104 Fed. 2d. 999, cert. den. 308 U. S. 610, 60 S. Ct. 174.

Conclusion

To avoid prolixity, reference is now made to the Petition for Appeal filed in this cause which we incorporate herein by reference and particularly each and every Assignment of Error therein contained, and hereby make the same a part hereof to show that substantial questions were presented to the lower courts rendering judgments against appellant.

A most valuable property right of appellant is involved herein—his license to practice medicine in the State of Mississippi. The statutes and proceedings involved are highly penal in that they attempt to deprive him of this property right. Due process of law requires that some specification of charges or complaint advising him of the nature and cause of the accusation for which his said property right is to be confiscated, be made. Due process requires legal process in such a proceeding, that kind of process which will give him a reasonable opportunity to be heard in defense of his property right. Vague, uncertain, general and indefinite notices without specification of charges or complaints are not sufficient, either to afford him a reasonable opportunity to prepare and present his defenses, or a reasonable opportunity to be heard.

Moreover, the statute involved provides that Appellee Board, and as construed by Mississippi Supreme Court, it provides that not only Appellee Board, but its Executive

Officer, or its Executive Committee, "may" revoke the license of an accused for any of the causes named, or either "may" suspend the license of an accused for such cause or causes. The way is left open, wide open, for either of these agencies, or all of them, not to act even as to a known transgressor. Thereby power, unlimited, arbitrary and unreasonable power is reposed in either or all of these three agencies to discriminate as among the physicians in this state which are placed in one class by this act. The statute does not require action for any cause; it does not require either of these agencies to initiate a proceeding or make complaint as to any transgression of any particular licentiate. Whether or not either of these agencies will make any move as against a known and proven transgressor is left wholly within the discretion of the repository of the power to act. Moreover one licentiate may be tried by the Executive Officer, one by the Executive Committee, one by the Mississippi State Board of Health, while others may be tried in various and sundry ways according to the whims and caprices of either or all of the agencies.

Here there is unlimited, unreasonable and arbitrary power to discriminate as among the members of the class covered by the statute both as to action or non-action, and as to method, manner and means of prosecution, trial and conviction.

Wherefore, the Supreme Court of the United States should take jurisdiction of this cause for final hearing and full review in accordance with the rules of this court, because of the fact that the Mississippi Supreme Court judgment reversing the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, holding the proceedings herein null and void because of the denial of due process, and thereupon ordering the reinstatement of said order of Appellee Board attempting to revoke appellant's license, together with the affirmation

of validity of the statute involved, both as written and as construed by said Appellate Court, are all in direct conflict with the constitutional provisions aforesaid, and the applicable decisions of this court, and have so radically and arbitrarily departed from the Constitution of the United States and the accepted and regular course of judicial procedure for the trial of accused persons to deprive them of their property and property rights as to call for the supervisory power of the Supreme Court of the United States.

Wherefore, appellant is entitled to a reversal, and reinstatement of the order of the Circuit Court for the First Judicial District of Hinds County, Mississippi, holding said order null and void and thereupon holding the proceedings herein, together with the statute involved both as written and as construed, unconstitutional and void.

Appendix "A"—See Opinion, Mississippi Supreme Court.

Appendix "B"—See Opinion, Mississippi Supreme Court Overruling Suggestion of Error.

Appendix "C"—See Petition for Appeal, Assignments of Error, etc.

Respectfully submitted,

FORREST B. JACKSON,
By FORREST B. JACKSON,
Counsel for Appellant.

O. W. PHILLIPS,
Of Counsel.

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,652

(Opinion rendered October 9, 1944)

MISSISSIPPI STATE BOARD OF HEALTH

vs.

DR. BENJAMIN F. JOHNSON, JR.

In Banc: Roberds, J.

Appellant Board, at a hearing before it on October 21, 1943, found that appellee Johnson had performed abortions not necessary to save the lives of pregnant women, and revoked his license to practice medicine in Mississippi. Johnson, by writ of certiorari, brought the matter for review before the circuit judge of Hinds County, who reversed the order of the Board and remanded the case for further proceedings. From this judgment the Board appeals.

The appeal involves the questions (1) whether the proceedings before the Board were lawfully initiated and (2) whether the notice of the charges given appellee Johnson was legally sufficient in substance.

On the first question, it is the contention of Johnson that (a) the State Board of Health took no action itself prior to the hearing and that the notice to appellee was initiated solely by the Executive Officer thereof without authority of the Board, and (b) that no charge against appellee had been lodged with the Board, and that, therefore, the proceedings were unauthorized and illegal.

The notice to appellee was in the form of a registered letter and was signed "Felix J. Underwood, M. D., Secretary and Executive Officer," and had attached thereto the seal of the Mississippi State Board of Health, and notified him to appear before the State Board of Health at the time and place named therein for a hearing upon the charges therein set out. It purported to be sent by authority and

direction of an order of the Executive Committee, acting for the State Board of Health, adopted at a called meeting October 6, 1943, at which only two of the members of the Committee were present, the order reciting that certain complainants and grievances against appellee had been made known to the Committee.

The Mississippi State Board of Health consists of ten members, eight of whom must be regular qualified physicians of this state and members of the state medical association, to be appointed by the governor and confirmed by the senate, and selected from twenty-one physicians nominated to the governor by the medical association, and one shall be a dentist and member of the state dental association, who shall also be appointed by the governor from three nominated to him by the dental association. Section 7024, Code 1942. The tenth member is elected by the Board "who shall be known as the executive officer," who, by virtue of his election, is "a member of the board of health and shall be secretary of the board and committees appointed or created by the board," and who "shall be vested with all the authority of the board when it is not in session and subject to such rules and regulations as may be prescribed by" the board. Section 7026, Code 1942. Dr. Underwood was the duly elected and acting executive officer.

The board is also authorized to appoint an executive committee of three members, "and said executive committee shall have authority to execute all the powers herein vested in said board, in the interim of the meetings of said board; and any action of said executive committee shall be legal and binding until modified or annulled by said state board of health * * *. And two members of the executive committee shall be a quorum for the transaction of business." Section 7027, Code, 1942.

By Section 8893, said Code, the Mississippi State Board of Health "may on its own initiative or on complaint suspend or revoke for any cause named below (including the charge involved herein) any license" of any physician to practice medicine in Mississippi.

Thus it is seen that the Executive Committee can legally act through two of its members and that the foregoing

action of that Committee and the issuance of said notice to appellee were the valid acts of the Mississippi State Board of Health itself, and that no complaint, formal or otherwise, to either the Board or the Committee is essential to the lawful initiation of such proceedings.

Considering now the second question, appellee says that the charges as made were vague, general, indefinite and inconsistent, and did not inform him of the nature and cause thereof so that he could prepare his defense thereto, and that, therefore, he was denied his constitutional right of due process of law. The notice describes the charges as "Procuring, or attempting to procure, or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman." This is the language of the statute (Section 8893 (5), Code 1942) and the wording of the order of the Executive Committee authorizing and directing its issuance. Following receipt of this notice by Dr. Johnson his counsel wrote Dr. Underwood saying, "there is nothing in your leter to indicate when, where, on what occasion, or the persons involved, and I, therefore, submit to you in all fairness, do not amount to any charges that should require a defense by Dr. Johnson," and, "requesting that we be furnished with the cause or nature of the accusations." In reply counsel for the Board wrote counsel for appellee, giving him the names of ten women upon whom "unnecessary abortions" had been procured by appellee, with the approximate times when such acts were performed. Construing the original notice and this letter together, they charge, in the last analysis, that appellee, at different times, approximately stated, had procured abortions on ten named pregnant women, which abortions were not necessary to preserve their lives. This eliminated the alternatives of attempting or pretending to procure, or aiding and abetting in procuring such abortions set out in the original notice. Was this sufficient to give Dr. Johnson notice of the nature and cause of the offense?

Mississippi has no statute prescribing the form or substance of such notices. The statute does define the act (Section 8893 (5), Code 1942), and the original notice in

this case is in the words of the statute, which itself is usually sufficient, even in criminal charges. However, the essentials of such notices, in the absence of statutes prescribing them, seem well settled. The Florida court stated the rule to be "And in such proceedings it is sufficient if the accused is informed with reasonable certainty of the nature and cause of the accusation against him, has reasonable opportunity to defend against attempted proof of such charges, and the proceedings are conducted in a fair and impartial manner, free from any just suspicion or prejudice, unfairness, fraud, or oppression." State v. Whitman, 116 Fla. 196, 156 So. 705. See also 41 Am. Jur. p. 184, Sec. 60. It is further laid down by the last authority "In the absence of statute requiring it, the strict rules of pleading in judicial cases do not apply to revocation proceedings before a board of medical examiners * * *." It is recognized that the members of this Board are not learned in the law and legal procedure and more laxity is allowed in their pleadings and procedure than in strict law courts, provided no substantive rights of the accused are denied him.

The accusation in this case informed appellee of every element involved in the charge except it did not describe the means, or technique, used in producing the abortions, nor undertake to give a definition thereof. It was not necessary to set out the means. Lacking lawful justification for the act, it mattered not whether it was done by giving medicine or using instruments—it was abortion. And on this point it is pertinent to state that appellee did not request appellant to inform him of the means, although it is argued in appellee's brief. As to the failure to define abortion in the notice, it is said in 1 Am. Jur. p. 133, Sec. 2, "In criminal law the crime of abortion is the wilful bringing about of an abortion without justification or excuse." The only justification or excuse in this case would have been the necessity to save the lives of the women. The charge says that was not necessary. Stripped of all technical niceties, and looked at in a common-sense way, it would seem rather absurd to inform a doctor he had performed abortions not necessary to save the lives of the

women, and at the same time assume he did not know what the word abortion meant, and that he needed to be given a definition thereof and the detailed manner of producing it.

It is further noted that counsel for the Board in his letter to counsel for appellee said "• • • I will furnish you with this information so far as I know or can ascertain." Presumably he did that. It frequently happens that even in criminal indictments needed information is lacking therein because it is not known to the grand jury, but the indictment is not thereby rendered invalid where the reason for the failure is set out. It is natural, too, in cases of this kind that pride and delicacy of feeling deter the victims from giving information of both the general fact and more especially the embarrassing details.

Again, after appellee received the additional information upon his request, he proceeded with the hearing and without objecting to the sufficiency of that given, or requesting further particulars, which, in civil actions, precludes such person from thereafter complaining of lack of knowledge of details.

It is not claimed that appellee did not have reasonable opportunity to defend the charges. The notice was given October 6th to appear before the full Board at the Old Capitol in the City of Jackson, October 21, requesting appellee to furnish the Secretary the names of any witnesses, papers, records and books he might desire, so that the Board might issue proper subpoenas therefor and have them present. Nor is it suggested that the proceedings were not conducted in a fair and impartial manner, free from just suspicion of prejudice, fraud or oppression. In other words, appellee does not contend on this appeal that he did not have a fair trial.

While this court is zealous to guard individual rights and would caution these quasi-judicial tribunals to be careful that such rights are fully protected in proceedings before them, yet it is clear in this case appellee was informed with reasonable certainty of the nature and cause of the accusations against him, had ample opportunity to defend against them, and had a fair and impartial hearing thereon.

It follows that the judgment of the circuit court should be, and it is, reversed, and the judgment of the Mississippi State Board of Health should be, and it is hereby, reinstated.

Reversed, and Judgment of Appellant Reinstated.

Endorsed on Back: 35,652. Mississippi State Board of Health vs. Dr. Benjamin F. Johnson, Jr. Filed 10/9/44. Tom Q. Ellis, Clerk. 15431.

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,652

(Opinion rendered November 27, 1944)

MISSISSIPPI STATE BOARD OF HEALTH

vs.

DR. B. F. JOHNSON, JR.

In Banc: Griffith, J.

On Suggestion of Error

We have carefully reviewed the argument now made upon the points presented on the original submission and have decided to make no modification in our opinion as delivered. Several new points have been presented and argued in the suggestion of error. As to these, we again call attention to the rule that new points made and presented for the first time on a suggestion of error are not considered unless exceptional reason therefor is shown, and we find none such here. Eady v. State, 153 Miss. 696; State v. Tann, 172 Miss. 167.

Suggestion of Error Overruled.

Endorsed on Back: 35,652. Mississippi State Board of Health vs. Dr. B. F. Johnson, Jr. Filed 11/27/44. Tom Q. Ellis, Clerk. 15474.